SIDLEY AUSTIN BROWN & WOOD LLP

BEIJING
BRUSSELS
CHICAGO
DALLAS
GENEVA
HONG KONG
LONDON

1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com

FOUNDED 1866

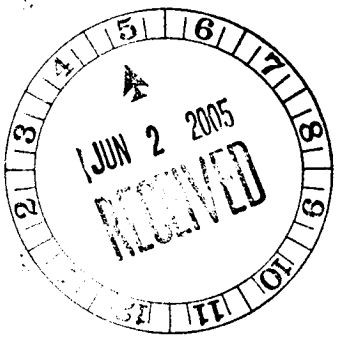
LOS ANGELES
NEW YORK
SAN FRANCISCO
SHANGHAI
SINGAPORE
TOKYO
WASHINGTON, D.C.

WRITER'S DIRECT NUMBER
(202) 736-8175

WRITER'S E-MAIL ADDRESS
pmoates@sidley.com

24120

June 2, 2005



By Hand

The Honorable Vernon Williams
Secretary
Surface Transportation Board
1922 K St, N.W.
Washington, D.C. 20423

NOR 42093

Dear Secretary Williams:

As counsel for Norfolk Southern Railway Company ("NSR"), Defendant in the above-captioned rate complaint proceeding, we request that the Board substitute the attached (redacted) public version of the letter that we filed on NSR's behalf in this Docket on May 26, 2005, for the version in the Board's public file. That unredacted version, which contains information that may be competitively sensitive, should be maintained in a separate file for non-public submissions containing confidential information. For the Board's convenience, we have also included a disk containing an electronic copy of the public version of our May 26 Letter.

Separately, in response to the letter filed in this proceeding on June 1, 2005, by counsel for BP Amoco Chemical Company ("BP Amoco"), NS states that it is not amenable to BP Amoco's request to "hold to the last rate and terms quoted by NS during negotiations with BP" during the course of the informal non-binding mediation in which the parties have agreed to participate. As explained in our May 26, 2005 letter, NS has the statutory right to establish a common carrier rate for the movement at issue in BP Amoco's complaint and to charge that rate unless and until the Board finds it to be unlawful. NS exercised that ratemaking initiative by issuing NSRQ 64831, and it believes that common carrier rate (including all applicable terms and conditions) to be reasonable. Moreover, for the reasons given in our May 26, 2005 letter, we

respectfully submit that there is no factual or legal basis to justify the extraordinary, emergency action of enjoining NS from charging the rate that it has established for the movement at issue.

Please direct any inquiries regarding this matter to the undersigned.

Respectfully submitted,

G. Paul Moates
Paul A. Hemmersbaugh

Enclosures

cc: Mr. Joseph H. Dettmar
Mr. George A. Aspatore
Mr. Michael F. McBride
Mr. Tom O'Connor

DC1 775900v.1

SIDLEY AUSTIN BROWN & WOOD LLP

CHICAGO
DALLAS
LOS ANGELES
NEW YORK
SAN FRANCISCO

1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com

FOUNDED 1866

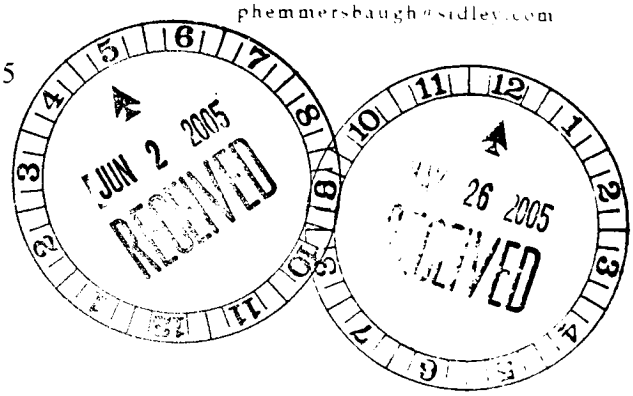
GENEVA
HONG KONG
SHANGHAI
SINGAPORE
TOKYO

WRITER'S DIRECT NUMBER
(202) 736-8538

WRITER'S E-MAIL ADDRESS
phemmersbaugh@sidley.com

PUBLIC VERSION

May 26, 2005



BY HAND

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: STB Docket No. 42093, *BP Amoco Chemical Co. v. Norfolk Southern Railway Co.*

Dear Secretary Williams:

This is the response of Norfolk Southern Railway Company ("NS") mandated by the Board's May 23 Order in *BP Amoco Chemical Co. v. Norfolk Southern Railway Co.*, STB Docket No. 42093 (late release May 23, 2005) (the "Order") (directing NS to respond to BP's requests for mediation and for an injunction by noon on May 26, 2005). In response to the two questions posed by the Order, NS advises the Board that: (1) assuming the fulfillment of certain necessary conditions, NS will agree to voluntary non-binding mediation of this dispute; and that (2) NS believes BP's request for an injunction is unwarranted and should be denied and the rate contained in the common carrier rate attached hereto as an exhibit should govern. Below, NS provides a short background regarding this dispute, explains its position on BP's two requests, and seeks clarification from the Board on a few procedural matters.

I. BACKGROUND

NS provides rail transportation service to BP Amoco Chemical Company ("BP") between several origins and destinations, including transportation of the hazardous chemical "paraxylene" from a BP facility in Decatur, Alabama to its customer's destination in Kingsport, Tennessee. Until this month (May 2005), NS moved the paraxylene pursuant to a transportation contract between NS and BP. NS currently transports this traffic between Decatur and Kingsport (hereinafter referred to as the "paraxylene movement") pursuant to a common carrier rate ("CCR") established on May 26, and made retroactive to May 1, 2005. *See* NSRQ 64831 (copy attached as exhibit hereto).

In anticipation of the April 30, 2005 expiration of the parties' most recent transportation contract, NS and BP engaged in good faith contract negotiations. During those negotiations, NS explained to BP that it believed a rate increase was appropriate to reflect market conditions, the capacity constraints faced by NS on the lines over which the issue traffic moves, and the risks associated with handling a hazardous chemical like paraxylene. On May 4, 2005, BP sent a letter to NS demanding a reduction in rates for the paraxylene movement, proposing a "counteroffer" rate that represented a [redacted]% reduction below the expiring contract rate for a period of seven years, and sought NS' response to the counteroffer within one week, stating that BP believed the parties had exhausted their efforts to reach a negotiated rate agreement for the paraxylene movement. *See* L. Sierra Letter to D. Seale (May 4, 2005) (Attachment C to BP Complaint). NS responded by declining BP's counteroffer and advising that since BP had rejected NS's offer, a common carrier rate (the "Preliminary Rate") would apply. *See* D. Lawson Letter to L. Sierra (May 11, 2005).

BP commenced this rate reasonableness proceeding, invoking the Board's Rate Guidelines – Non-Coal Proceedings, 1 STB 1004 (1996), by filing a Complaint on May 23, 2005. *See* Order at 1. Today, less than three days later, NS issued its revised CCR, which supersedes and replaces the Preliminary Rate. When BP made it clear that negotiations were at an end, the only existing common carrier rate that could apply to the paraxylene move was one calculated pursuant to NS' general mileage scale CCR for industrial chemicals moving in tank cars. This CCR is similar to the old "class rates" and exists to ensure that NS fulfills its common carrier obligation to have a CCR rate in place that can apply to any car tendered to NS at any location, regardless of destination or commodity. Had NS realized that contract negotiations were at an end, or if BP had made a formal request for a CCR applicable to the movement of paraxylene from Decatur, Alabama to Kingsport, Tennessee, the CCR in the attached exhibit would have been issued before today.

Because other CCR terms can affect the rate actually being charged, it is important to understand the terms of the CCR (*see* Exhibit) that contains the governing rate. The CCR of [redacted]/car includes two amounts that are either stated separately or accounted for differently in the prior contract rate and in NS's last contract offer to BP, *i.e.*, the existing fuel surcharge and mileage allowances.

To make an apples-to-apples comparison of the $[redacted] rate in NS' last contract offer to BP and NSRQ 64831 (NS' current CCR, set forth in the exhibit), it is necessary to increase the $[redacted] by (i) adding the current NS fuel surcharge ([redacted], or approximately [redacted]) and (ii) adding the prescribed mileage allowance NS will pay BP (or whoever provides the private cars in which the paraxylene moves), approximately $[redacted].[1] Thus the $[redacted] rate that NS last offered BP was actually a $[redacted] rate when adjusted to reflect similar terms to those contained in the current NS CCR. Thus, the current NS CCR is an increase over the last

[1] This is NS' best current estimate of the relevant mileage allowances. Should the non-binding mediation process not resolve this matter, NS will provide more precise figures in its submissions relating to the Board's determination of rate reasonableness.

contract offer of less than 15%. NS believes that the URCS costs of the full mileage CCR (NSRQ 64831, *see* Exhibit) will yield a revenue-to-variable cost ratio of approximately 2.5.[2]

II. BP's Request for Mediation

BP has requested that NS agree to voluntary mediation of this rate dispute. NS is amenable to that suggestion, so long as it is clearly understood and agreed that mediation will be entirely non-binding on the parties, and subject to strict confidentiality requirements and an appropriate protective order. NS expects that the parties could work together to develop appropriate proposed confidentiality and protective orders, which at a minimum must comply with the confidentiality provisions of Section 1109.4(d). In addition, any mediator should be an independent neutral appointed by the Board. NS believes the foregoing conditions are fully consistent with the Board's rules governing mandatory mediation in Stand Alone Cost cases brought under the Coal Rate Guidelines. *See* 49 C.F.R. § 1109.4.

The three foregoing requirements are prerequisites upon which NS conditions its consent to non-binding mediation. If any of these three requirements is not satisfied, NS does not consent to mediation. In addition, NS believes it desirable, but not essential, that the Board hold this proceeding in abeyance pending the completion of mediation. This would include suspension of the requirements of 49 C.F.R. § 1111.9 regarding the time for filing an Answer and any opposition to use of simplified procedures and subsequent responses thereto, and postponing the Board's establishment of a procedural schedule for discovery, the submission of evidence, and briefing. NS hereby requests that the Board clarify whether it would hold a formal rate reasonableness proceeding in abeyance during the pendency of mediation. By offering its conditional consent to non-binding mediation, NS does not waive its right to object to the use or applicability of the *Rate Guidelines – Non-coal Proceedings*, Ex Parte 347 (Sub-No.2)(served Dec. 31, 1996) – or any other specific modified procedure -- as the appropriate standard or approach for determining the reasonableness of the challenged rates.

III. The Board Should Deny BP's Request for an Injunction Against Collection of NS' Common Carrier Rate.

Granting the injunction to impose a zero mileage rate of [redacted] would deny NS its right to determine in the first instance both the form and level of the rate it will apply.[3] This is a

---

[2] As the Board knows, the distinction between full mileage and zero mileage rates is an important one, and that is especially true in a case such as this, where the tank car equipment provided to transport the paraxylene carries a relatively high mileage rate. A zero mileage rate (such as that which governed the issue movement when NS handled it for BP under contract) is always lower than a full mileage rate (such as the one that is presently at issue in the challenged CCR), because the former takes into account the fact that the railroad is not required to pay the car owner for the use of its equipment, whereas the latter, by definition, includes full payment of the mileage rates established for the applicable equipment.

[3] It is unclear from BP's complaint and accompanying narrative whether BP means for the [redacted] zero mileage rate, which it seeks to have the Board impose by injunction, to be governed by NS'

long established right that is an integral part of the common carrier obligation requiring a railroad to accept traffic tendered to it. NS believes it is implausible that a rate that governs the movement of hazardous material over capacity-constrained lines and that yields only a 2.5 revenue-to-variable cost ratio could possibly be so unreasonably high as to justify an extraordinary intervention by the Board that would deny NS its common carrier right to set both the level and terms of the rate by which it chooses to fulfill its common carrier obligation.

The Board should deny BP's request to enjoin NS from collecting its lawfully established common carrier rate as unprecedented and unnecessary; inconsistent with federal statutes and fundamental policy vesting rate initiative with the rail carrier; and unsupported by the record before the Board. Historically, the ICC had broad powers to "investigate and suspend" a common carrier rate established by a rail carrier. In the Staggers Act and subsequent statutes, however, Congress sharply curtailed the ICC's power to suspend a common carrier rate prior to a full on-the-merits determination of whether the rate in question was unreasonable. *See, e.g.*, 49 U.S.C. § 10707(c) (1994) (now repealed).

Ultimately, Congress repealed the ICC's former power to suspend rates at the same time that it created the Surface Transportation Board, in the Interstate Commerce Commission Termination Act of 1995, P.L. No. 94-210 ("ICCTA"). As the Board recently summarized,

> In [ICCTA], Congress further facilitated railroads' rate-making initiative by repealing the rate suspension procedures under which rate adjustments were sometimes prohibited from taking effect without first being investigated. . . .

Arizona Public Service Co. v. BNSF, STB Doc. No. 42077, Slip Op at 7 (served Oct. 14, 2003). Thus, it is clear that the Board does not have the power to suspend common carrier rates that was once exercised by the ICC. BP's request for an injunction, however, is the same thing under a different name. Regardless of the label, what BP is seeking is an order prohibiting NS from collecting its lawfully established common carrier rate at the very outset of the case, prior to the submission of any evidence or determination of whether the challenged rate is unreasonable. As the Board recognized in *Arizona Public Service*, *supra*, this is the power that Congress withdrew – in all but the most exceptional circumstances – in ICCTA.

ICCTA did leave in place a residual general power to issue injunctions in emergency situations in which such relief was essential to prevent imminent irreparable harm. *See* 49 U.S.C. § 721(b)(4). Although this emergency power was intended primarily to allow the Board to prevent irreparable harm in the context of exemption proceedings, Congress noted that, in the context of rail rates, the Board was also "empowered under section 721(b)(4) to grant administrative injunctive relief to address imminent threat of irreparable harm." Conference

---

standard fuel surcharge provision (which governed the expired contract rate). If BP does not intend for that standard fuel surcharge to apply, then its proposed injunctive rate constitutes an even larger unjustified and unsupported reduction of the CCR that NS has established for the paraxylene movement.

Report 104-422, Sec. 10701 (1995) (emphasis added). As the Board explained in *Arizona Public Service*, the Board will grant such relief only where the party seeking that relief satisfies all of the requirements for emergency injunctive relief, including a showing that the requesting party "will be irreparably harmed in the absence of the requested relief." Decision, STB Doc. No. 42077 at 4-5 (citing *DeBruce Grain, Inc. v. Union Pacific RR*, STB Doc. No. 42023, slip op at 3, n.3 (1997)) (emphasis added). [4]

In the present case, BP has not alleged or attempted to show – and, *a fortiori*, has not shown – that it will suffer irreparable harm if NS is not enjoined from collecting its lawfully established common carrier rate. Because BP has not even *alleged* that it will suffer irreparable harm, it cannot sustain its burden of proving this essential prerequisite to the emergency remedy of injunctive relief.[5] *See generally, DeBruce Grain*, STB Doc. No. 42033 Order (served April 27, 1998) (party seeking injunction "must show that the claimed injury is 'both certain and great'"). More generally, rail rate cases are peculiarly inappropriate for equitable injunctive relief because the statutory and regulatory scheme expressly provide for an adequate remedy at law. If the Board finds the challenged rate to be unreasonable, it may prescribe a rate and direct that the carrier (here, NS) pay monetary "reparations" to make the complainant whole for overpayments. Such "reparable" injury is the antithesis of the sort of irreparable harm that is the indispensable threshold requirement for injunctive relief. By contrast, if NS were enjoined from collecting the challenged rate, it would have no right to recoup the revenues it was unable to collect between the issuance of the injunction and a Board finding of rate reasonableness.

NS is aware of only one extraordinary instance in which the Board exercised its emergency power to enjoin the collection of a common carrier rate, and the unique circumstances of that case bear no resemblance to the present case. In *Arizona Public Service v.*

---

[4] The other three essential elements of a claim for injunctive relief are: (1) showing that moving party is likely to succeed on the merits; (2) showing that the issuance of the injunction will not substantially harm other parties; and (3) showing that an injunction would be in the public interest. *DeBruce Grain*, slip op at 3, n.3. The Board need not reach these factors because BP has made no showing that it will suffer irreparable harm in the absence of an injunction. If the Board were to consider these factors, they would further confirm BP should be denied an injunction, because it has made no attempt to show that it satisfies these three requirements. If the Board decides to give serious consideration to granting BP's request for an injunction, NS requests an opportunity to present further evidence and argument to show that BP cannot meet its burden of showing it is entitled to the extraordinary emergency injunctive relief it seeks.

[5] Because BP was under the misimpression that NS intended to impose the higher Preliminary Rate as the permanent common carrier rate, it is possible that BP will withdraw its request for an injunction once it understands that NS intends to seek the lower current common carrier rate for the period from the expiration of the last contract to the present. In any event, it is quite unlikely that BP could make a showing that NS' collection of the current common carrier rate will cause it irreparable harm. BP is one of the largest corporations in the world, and the amount of money at issue in this single movement of paraxylene (which BP seeks to have treated as a "small shipment") simply does not pose a plausible threat of irreparable harm to BP.

BNSF, the Board ordered a rate prescription in 1997. 2 STB 367 (1997). Six years later, defendant BNSF petitioned to reopen the proceeding based on materially changed circumstances, namely that the principal mine origin would exhaust its coal supply before the end of the SAC analysis period. The Board reopened the case to re-determine the appropriate maximum reasonable rate and vacated its prior rate prescription. *See APS*, STB Doc. No. 42088, Decision slip op at 4-7 (served May 12, 2003).

At the same time, the Board exercised its Section 721(b)(4) power to enjoin BNSF from collecting its new common carrier rate until the Board determined the new maximum reasonable rate under the changed circumstances. *See id.* In so doing, the Board acknowledged that, absent extraordinary circumstances, the presumption should be that the carrier's rate should remain in place during the pendency of a rate reasonableness proceeding. *See id.* Because the Board found that the magnitude of the increase of BNSF's rate over the prescribed rate was so "massive and unexpected," the Board took the unprecedented step of ordering BNSF to maintain its rate at the prescribed rate in order to avoid irreparable harm to complainant APS. *Id.* The Board mitigated the effect of its injunction by taking the extraordinary step of stating that if it found the maximum reasonable rate was higher than the rate BNSF collected during the pendency of the proceeding, it would order APS to remit to BNSF the amount of the underpayments plus interest. *Id.* As the foregoing discussion shows, the present case is distinguished from *APS* in a number of material, important respects.

Thank you for your attention to this matter. If you have any questions about this response, or require additional information, please contact one of the undersigned.

Respectfully submitted,

G. Paul Moates

G. Paul Moates
Paul A. Hemmersbaugh

Counsel for Norfolk Southern Railway Company

Enclosure

cc: George A. Aspatore, Norfolk Southern Railway Co.
Michael F. McBride, Counsel for BP Amoco Chemical Co.
Tom O'Connor, Snavely King et al

EXHIBIT

Norfolk Southern Corporation
Merchandise Marketing Department
110 Franklin Road, S. E.
Roanoke, Virginia 24042-0041

Joseph C. Osborne, Jr.
Group Vice President - Chemicals
540-985-6773
jcosbor2@nscorp.com

May 26, 2005

VIA FAX & OVERNIGHT MAIL

Mr. Jeff Foshee
Dir. Logistics A+A Americas
150 W. Warrenville Rd.
Mail Code 605-2W
Naperville, IL 60563-8460

Dear Jeff:

In regard to the question of the public price that applies for the shipment of Paraxylene from BP's Decatur, AL plant to Eastman Chemical at Kingsport, TN, I understand that your office made inquiries to that effect to our Billing Group in Atlanta, GA.

The tariff that applies, NSRQ 64831, is attached and should be used by BP for the shipments described above. This tariff is effective May 1, 2005, and we are arranging to correct any misunderstanding on this point with our Billing Group.

For future reference, please address all requests or questions on rates, contracts and tariffs, including any formal requests for common carrier rates, to my group, as we are the responsible department within Norfolk Southern.

Please call me if you have any questions.

Sincerely,

Joseph C. Osborne

ATTACHMENT: NSRQ 64831

Cc: David Lawson, VP – Industrial Products, NS
Luis Sierra, Vice President, BP

Norfolk Southern Price Authority: NSRQ 64831

Effective: 5/1/05

Commodity: Paraxylene

STCC: 28-151-77

Origin: Decatur, AL

Destination: Kingsport, TN

Rate: $2400 per Carload

Route: NS Direct

Equipment: Tank Cars

Mileage Allowance: Mileage allowance will be paid in full

Escalation: 100 percent of the RCAF-U, beginning 7/1/05

Governing Publications: Subject to the rules and provisions published in Norfolk Southern's Conditions of Carriage #1-series or successor publications

Fuel Surcharge:

IN THE EVENT THE PRICE OF WEST TEXAS INTERMEDIATE CRUDE OIL, AS PUBLISHED IN THE WALL STREET JOURNAL, EXCEEDS $55.00 PER BARREL CALCULATED USING THE DAILY PRICES PUBLISHED IN THE WALL STREET JOURNAL, NORFOLK SOUTHERN WILL ASSESS A FUEL SURCHARGE ON ALL LINEHAUL FREIGHT CHARGES (AS SET FORTH BELOW, THE "WTI AVERAGE PRICE").

THE APPLICABLE FUEL SURCHARGE PERCENTAGE SHALL BE APPLIED TO EACH SHIPMENT HAVING A BILL OF LADING DATED ON OR AFTER THE 1ST DAY OF THE SECOND CALENDAR MONTH OF A GIVEN WTI AVERAGE PRICE CALCULATION

THE FUEL SURCHARGE WILL BE 0.4% OF THE LINEHAUL FREIGHT CHARGE FOR EVERY $1.00 PER BARREL, OR PORTION THEREOF, BY WHICH THE WTI AVERAGE PRICE EXCEEDS $55.00. THE AVERAGE WTI PRICE FOR A GIVEN CALENDAR MONTH WILL BE DETERMINED BY ADDING THE DAILY WTI CRUDE OIL PRICES PUBLISHED IN THE WALL STREET JOURNAL DURING A CALENDAR MONTH AND DIVIDING THE RESULT BY THE NUMBER OF DAYS SO PUBLISHED IN THAT GIVEN MONTH. THE RESULT WILL BE ROUNDED TO THE NEAREST CENT. IF THE WALL STREET JOURNAL CEASES PUBLICATION OF THE PRICE OF WEST TEXAS CRUDE OIL, NS WILL EMPLOY A SUITABLE SOURCE OF PRICE OR MEASURE. THE FOLLOWING SCHEDULE REFLECTS THE APPLICABLE FUEL SURCHARGE WITHIN THE WTI AVERAGE PRICE RANGES NOTED BELOW.

WTI AVG PRICE/BARREL	FUEL SURCHARGE PERCENTAGE
$55.00 AND BELOW	NO SURCHARGE
$55.01 - $56.00	0.4%

$56.01 - $57.00	0.8%
$57.01 - $58.00	1.2%
$58.01 - $59.00	1.6%
$59.01 - $60.00	2.0%
$60.01 - $61.00	2.4%
$61.01 - $62.00	2.8%
$62.01 - $63.00	3.2%
$63.01 - $64.00	3.6%
$64.01 - $65.00	4.0%
$65.01 - $66.00	4.4%
$66.01 - $67.00	4.8%
$67.01 - $68.00	5.2%
$68.01 - $69.00	5.6%
$69.01 - $70.00	6.0%
$70.01 - $71.00	6.4%
$71.01 - $72.00	6.8%

Certificate of Service

I hereby certify that on this 26th day of May 2005, I caused the foregoing Response of Norfolk Southern to be served upon the following by first class mail or more expeditious method of delivery:

Michael F. McBride
LaBoeuf, Lamb, Greene, & MacRae, LLP
1875 Connecticut Ave, N.W.
Suite 1200
Washington, D.C. 20009 (by hand)

Tom O'Connor
Snavely, King, Majoros, O'Conner & Lee, Inc.
1220 L Street N.W.
Washington, D.C. 20005 (*by fax and first class mail*)